

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ANDREW PFEIFFER,

Defendant-Appellant.

UNPUBLISHED

June 22, 2001

No. 221546

Genesee Circuit Court

LC No. 98-003488-FC

Before: Smolenski, P.J., McDonald and Jansen, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of criminal sexual conduct in the first degree, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to concurrent sentences of twenty-five to seventy-five years in prison for each count. Defendant appeals as of right. We affirm.

Defendant argues that his due process right to a proper appellate review of his trial was violated because a portion of the trial was not transcribed or recorded. Defendant asserts that he is entitled to a new trial because the surviving record is insufficient to allow appellate review of issues related to the prosecution's closing argument, court commentary, and part of defendant's closing argument. We disagree. Because defendant asserts that his constitutional due process right was violated, review is de novo. *People v Dunbar*, 463 Mich 606, 615; 625 NW2d 1 (2001).

If a defendant is able to make a colorable showing that deficiencies in transcription have adversely affected the ability to secure postconviction relief, and such matters have seasonably been brought to the trial court's attention, the defendant is entitled to a remedy. *People v Abdella*, 200 Mich App 473, 475-476; 505 NW2d 18 (1993). In order to overcome the presumption of accuracy, a petitioner must satisfy the following requirements: (1) seasonably seek relief, (2) assert with specificity the alleged inaccuracy, (3) provide some independent corroboration of the asserted inaccuracy, and (4) describe how the claimed inaccuracy in transcription has adversely affected the ability to secure postconviction relief pursuant to MCR 7.200 and 7.300. *Id.* at 476. Defendant also failed to comply with MCR 7.210(B)(2), which requires him to file a settled statement of facts to serve as a substitute for the missing portion of the transcript.

Defendant presents no issue on appeal other than the fact that the missing transcript portion denies him due process. He provides no independent corroboration that the missing transcript portion would show reversible error occurred at trial. Without a settled statement of facts or independent corroboration of what the missing transcript portion contained, this Court cannot determine whether reversible error occurred during the closing arguments and court commentary that were not transcribed.

Defendant also fails to describe how the missing transcript portion adversely affected his ability to obtain appellate relief. Defendant broadly asserts that he is unable to determine, without the complete transcript, whether the prosecutor committed reversible error during closing arguments, whether his own counsel was ineffective during closing arguments, or whether the court's comments improperly influenced the jury. However, defendant does not state on appeal, nor did he raise at trial or at sentencing any issue regarding specific improprieties in closing arguments or in the court's commentary. See *Elazier v Detroit Non-profit Housing Corp*, 158 Mich App 247; 404 NW2d 233 (1987).

A defendant's constitutional right to appeal is satisfied if the surviving record is sufficient to allow evaluation of the issues on appeal; sufficiency of the record depends upon the questions asked of it. *Elazier, supra* at 249-250, citing *People v Audison*, 126 Mich App 829, 835; 338 NW2d 235 (1983). This Court in *Elazier* stated that before a court grants a new trial based upon a failure of the transcription process, it must determine that the existing record and any possible settlement or reconstruction of the record is insufficient to allow evaluation of the specific allegations of error. In that case, the Court concluded that the trial court's grant of a new trial, based solely on the inability to fully reconstruct the missing portion of the records, was premature and an abuse of discretion. *Id.* at 250.

We will not remand this case for a new trial because defendant has not provided a settled statement of facts or independent corroboration of the missing transcript portion to substantiate reversible error. Defendant also fails to set forth specific allegations of error that are impossible to evaluate without the existence of a complete transcript.

Affirmed.

/s/ Michael R. Smolenski

/s/ Gary R. McDonald

/s/ Kathleen Jansen